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No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WALTER GREENE, JR.,

Petitioner,

vs.

ARMCO, INC., BROBECK, PHLEGER & HARRISON, JAMES L. MEEDER, and WILLIAM C. ANDERSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the constitutional right to jury is lost if a Court stays a jury trial in favor of an earlier non-jury resolution of the issues?

2. Whether the principles of res judicata or collateral estoppel may estop the right to have certain issues decided by a jury and if so, under what circumstances?

3. Whether the constitutional right to jury may be lost through operation of the doctrines of res judicata or collateral estoppel?

4. May an allegation of "fraud upon the Court" be resolved solely by operation of the doctrines of res judicata or collateral estoppel?

LIST OF PARTIES TO PROCEEDING BELOW

Petitioners certify that only the following were parties to the proceedings below:

Walter Greene, Jr.,
Katherine L. Greene.

Armco, Inc.;
Bellefonte Re-Insurance Company;
Brobeck, Phleger & Harrison;
James L. Meeder;
William C. Anderson;
Steven T. Johnson;
Universal Re-Insurance Company;
Mariana R. Pfaelzer;
Consuelo B. Marshall;
J. Clifford Wallace;
Robert Boochever;
Alex Kozinski;
John Linneman;
Dan C. Cohen;
David J. Carbine;
Griffith Parry;
All Judges of the United States Court of Appeals for the Ninth Circuit that sat on the Court between the dates of November 6, 1986 and March 17, 1987.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WALTER GREENE, JR.,

Petitioner,

vs.

ARMCO, INC., BROBECK, PHLEGER & HARRISON, JAMES L. MEEDER, AND WILLIAM C. ANDERSON,

Respondents.

Petitioner, WALTER GREENE, JR., respectfully prays that a Writ of Certiorari be issued to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on January 12, 1990.

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined in any Court of the United States that according to the rules of the common law."

PRIOR DECISIONS OF THIS COURT INVOLVED

In both Beacon Theatre, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 988 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 825 S.Ct. 894, 8 L.Ed. 44 (1962) this Court held that trial in a case with a timely asserted jury demand should proceed prior to the trial of a non-jury equitable claim where

the right to jury might be lost through operation of the doctrines of res judicata and collateral estoppel. [1]

In Hazel Atlas Co. v. Hartford Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 250, this Court set forth the principle of "fraud upon the Court" as an exception to the doctrine of res judicata.

This Petition presents the questions of whether the issue of "fraud upon the Court" may be resolved by invoking the principle of res judicata, and whether the principles of Beacon Theatre and Dairy Queen apply when the jury case is filed subsequent to the non-jury case.

---

[1] Both Beacon Theatre, supra, and Dairy Queen, supra, involved proceedings in a single action involving both legal and equitable claims. This case involves the proper order where in separate actions, the latter filed action contains the right to jury and the first filed action is non-jury.

OPINIONS AND ORDERS BELOW

The judgment and Opinion of the United States Court of Appeals for the Ninth Circuit is contained in an unpublished Memorandum entitled Walter Greene, Jr. v. Armco, Inc., etc., et al., No. 88-6509. The Memorandum Opinion is reprinted as Appendix "A" hereto.

A related appeal, entitled Walter Greene, Jr., Katherine L. Greene v. James L. Meeder, etc., et al., is reproduced as Appendix "B" (hereinafter the first appeal) hereto.

The Court of Appeals affirmed the Order of the District Court for the Central District of California. That Opinion is found at 696 F.Supp. 1328 (C.D. Cal. 1988).

JURISDICTION OF THE SUPREME COURT

The Opinion of the Court of Appeals was entered on January 12, 1990. No petition for rehearing, or for en banc consideration, was filed by the Petitioner.

The United States Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This Petition for Writ of Certiorari is filed within 90 days of the entry of the Opinion of the Court of Appeals. See, 28 U.S.C Section 2101(c).

STATEMENT OF THE CASE

Factual Statement

Petitioner, Walter Greene, Jr. and his wife, Katherine Greene, (the Greenes) have been involved in various lawsuits

with and against Armco, Inc., Bellefonte Re-Insurance Company, and their attorneys, James L. Meeder, William C. Anderson, and Brobeck, Phleger & Harrison. The litigation has been protracted, bitter, and complex.

The first case filed, was filed by the Respondents and entitled Armco, Inc. v. Walter Greene and Katherine L. Greene, civil action No. C 81-1231 N.D. Cal. That action did not contain a timely demand for jury by either party. Subsequent lawsuits filed contained timely jury demands. However, the first case filed became the first case scheduled for trial.

Prior to the first trial, the Greenes, now represented by new counsel, moved for a stay of the earlier non-jury trial in favor of a jury trial going first. The

motion was denied.[2] The case therefore proceeded to trial by the Court with the Greenes losing. All subsequently filed cases were thereafter disposed of through operation of the doctrines of res judicata or collateral estoppel.

The trial Court's judgment was reversed by the United States Court of Appeals for the Ninth Circuit because, among other things, the trial judge failed to admit relevant evidence. The cases that had been disposed of by invoking res judicata and collateral estoppel were accordingly reversed (see Appendix "C" hereto).

On remand, fully aware of the

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[2] A Petition for Writ of Mandamus relating to the jury trial issue was filed with the Ninth Circuit Court of Appeals, but became moot when the trial was concluded before a ruling on the Petition was rendered.

collateral estoppel trap, the Greenes moved to consolidate all cases for one jury trial. The Respondents filed a counter-motion, moving to stay all jury trials in favor of an earlier Court trial. The Court denied the Greenes' motion and granted the motion of the Respondents. One of the cases stayed was the instant matter.[3] In July 1985, a second bench trial was held, the previously excluded evidence was admitted, and the Greenes again lost. This time, however, a different three-judge panel of the Ninth Circuit, applying a clearly erroneous standard, affirmed the relevant portions of the lower Court's decision.

---

[3] A second Petition to the United States Court of Appeals for the Ninth Circuit, for a Writ of Mandamus on this issue was denied.

The Greenes thereafter filed another lawsuit in the Superior Court of the State of California against James L. Meeder (Meeder), Armco, Inc. and Brobeck, Phleger & Harrison. The Greenes argued in that lawsuit that the prior adverse decisions resulted from a corrupt conspiracy, involving the trial judge and had as a motive, among other things, the cover-up of the giving of false and perjured testimony by Meeder (see Appendix "B").

Thereafter, the Greenes' right to have the issues of this lawsuit decided by a jury was again lost, again through operation of the doctrines of res judicata and collateral estoppel.

The Greenes appealed arguing, among other things, that res judicata/collateral estoppel should not apply for two reasons:

1. The denial of the constitutional right to jury; and

2. The exception to the res judicata doctrine of fraud upon the Court.[4]

The Crucial Testimony

On September 27, 1983, Meeder testified under oath, before the State Bar Court of the State of California, that Walter Greene, Jr. had been held in contempt of Court in the presence of James L. Meeder. The precise testimony was:

> "Q. By Mr. Johnson [the State Bar Examiner]: Were you present during any proceedings in which Mr. Greene was held in contempt of Court, Mr.

---

[4] The relevant portion of the Greenes' brief is attached as Appendix "D".

Meeder?

A: Yes."

The testimony was categorically false!

(c.f., see Appendix "E")

At the time he gave the testimony, Meeder was a partner in the large and powerful San Francisco based law firm of Brobeck, Phleger & Harrison. Meeder was also a former law clerk of U.S. District Judge Robert Kelleher, Central District of California. The testimony was without question, false and given under oath, by an experienced litigation attorney. c.f. Appendix "E".

Greene made that testimony an issue in the litigation involving the parties, and wished to have the question resolved by jury. It was, however, decided by a bench trial in the Central District of California, with Meeder writing the Findings and Conclusions. Meeder wrote

that he was credible and truthful and that Greene was a liar, not credible, and that Rule 11 sanctions should be assessed against Greene. The trial judge signed the Meeder drafted Findings and Conclusions, and the Ninth Circuit, applying a clearly erroneous standard, affirmed.

The Greenes have since argued with overwhelming evidence, a fraud upon the Court, a cover-up of perjury and a denial of the Greenes' constitutional right to jury.

The Respondents have consistently argued, interchangably res judicata, collateral estoppel or issue preclusion.

The whole thing stinks.

The District Court Decision

The District Court granted the Respondents' Motion for Summary Judgment.

The District Court did not address the jury trial issue and disposed of the fraud upon the Court argument by invoking the principles of res judicata.

The Court of Appeals' Decision

The Court of Appeals in an unpublished decision likewise did not address the jury trial issue and also disposed of the fraud upon the Court argument by resort to the doctrines of res judicata and collateral estoppel.

REASONS FOR GRANTING THE WRIT

This Court has not previously considered the precise question presented in this Writ as there is a difference in the factual setting between this case and the cases of Beacon Theatre, Inc. v. Westover, supra, and Dairy Queen, Inc. v.

Wood, supra.

Both Beacon Theatre, supra, and Dairy Queen, supra, stand for a recognition by this Court that the constitutional right to jury should be protected and should not be lost through operation of the doctrines of res judicata and collateral estoppel. Both Beacon Theatre and Dairy Queen, however, involved proceedings in which claims were presented in a single action including both equitable (non-jury) and legal (jury) issues, by reason of the plaintiff having filed a legal action and the defendant having filed an equitable cross-action.

The important question of what should be the proper order when there are multiple actions with the later filed action containing the right to jury has not been decided by this Court.

It is respectfully submitted that the

Court should take this opportunity to decide the question as this case presents a perfect factual setting for this most important constitutional issue.

This Court has previously enumerated the rule of "fraud upon the Court" as an exception to the doctrine of res judicata. Hazel-Atlas v. Hartford Co., 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250. The second issue presented in this Petition is whether the exception to the rule of res judicata enunciated by this Court may be decided by invoking the principles of res judicata.

THE DECISION AND ACTIONS BELOW PRESENT AN IMPORTANT CONSTITUTIONAL ISSUE WHICH HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT.

There is nothing more fundamental or basic than one's constitutional right to jury. It is the essence of our legal

system and the cornerstone of the public's trust and respect for that system. It must be protected and protected by this Court.

The rationale of Beacon Theatre, Inc. v. Westover, supra, and Dairy Queen, Inc. v. Wood, supra, should be clarified so that it is clear that the rule enunciated by the Court applies in this factual setting.

The Petitioner's research discovered two Court of Appeals' decisions that relate. In Goldman, Sachs & Co. v. Edelstein 474 F.2d 76, 78 (2nd Cir. 1974), the Court stated:

> "Ordinarily one who asserts the important right to a jury trial in timely fashion is entitled to a stay of an earlier non-jury resolution of the issues which might collaterally estop exercise of this right to have them decided by jury. Beacon Theatre, Inc. v.

> Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 1988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 44 (1962)."

Goldman, Sachs & Co. v. Edelstein, supra, involved 15 cases filed at different times, which cases were consolidated for pre-trial purposes. The parties and the various actions were not identical but there was a risk that by proceeding with an earlier filed non-jury case, Goldman might be estopped by an adverse collateral judgment in a later proceeding. The Court held that the jury trial claim should be tried first. 494 F.2d at 78.

A second case which is illustrative is Walton v. Eaton Corp., 563 F.2d 66, 70-71 (3d Cir. 1977). In Walton v. Eaton, supra, the plaintiff filed a complaint and expressly waived jury. She later

obtained a second set of attorneys, who filed an amended complaint which was "in almost all respects...indistinguishable from her first." Id., at page 70. The Court ruled:

> "It is well established that if the original pleading in an action effectively waived trial by jury under Federal Rule of Civil Procedure 38(b) and (d), the right to trial by jury of all matters contained in those pleadings cannot be revived by amending the original pleadings. (Citations). Jury trial may be demanded for any 'new issues' raised by the amended pleadings, but the amendment does not revive a right, previously waived, to demand jury on the issues framed by the original pleadings.
>
> In this case, Mrs. Walton unquestionably waived her right to jury on all issues framed by her original complaint.
>
> . . . .
>
> In sum, under the sound reasoning of [Lanza

> v. Drexel & Co., 479 F.2d 1277 (2nd Cir. 1973)], and the other authorities treating with this point, it is obvious that no 'new issue' was added by Mrs. Walton's second complaint and therefore her first complaint with its express jury waiver did not entitle her dispute with Eaton to be resolved by jury."

A reading of the above two cases indicates that the rule ought to be:

> "A timely assertion of a right to jury shall not be impaired by the doctrines of res judicata or collateral estoppel. Previously filed non-jury action should be abated if it might collaterally estop the right to jury in a later filed action. This rule, however, does not revive a previously waived right to jury."

Such a holding would be absolutely consistent with the letter and principles of the Seventh Amendment to the United States Constitution.

The principle of res judicata embodies

a belief that one full fair opportunity to present one's case, with a right to appeal the results is enough. Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 262. The principle of res judicata is a procedural rule, and was never intended to be a vehicle that would supersede and nullify a Constitutional provision, i.e., the Seventh Amendment to the United States Constitution.

CONCLUSION

A review of the records and proceedings below show, beyond any legitimate dispute, that the Petitioner wished to have any issues where a jury trial was appropriate, decided by a jury. Conversely, the Respondents wish to have a non-jury trial deciding all actions

between the parties by later invoking the doctrine of collateral estoppel. Indeed, they were able to successfully accomplish this goal on two separate occasions.

The factual situation in the instant case presents an appropriate vehicle for this Court to decide the extent of the application of the rules set forth in Beacon Theatre, supra, and Dairy Queen, supra.

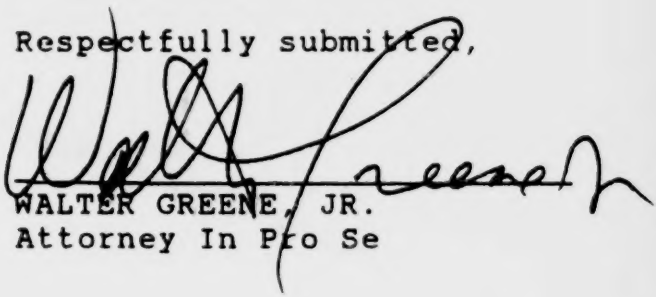
The history of our Constitution, a review of the cases interpreting our Constitution, and basic principles of constitutional fairness should have been noted by the Courts below. The fundamental right to a jury should not be lost to a rule of procedures and convenience.

This Court should issue a Writ of Certiorari to review the Opinion and judgment of the United States Court of

Appeals for the Ninth Circuit for the reasons set forth herein.

Dated: April 4, 1990.

Respectfully submitted,



WALTER GREENE, JR.
Attorney In Pro Se

APPENDIX A

NOT FOR PUBLICATION
MEMORANDUM
United States Court of Appeals
for the Ninth Circuit
No. 88-6509

On Appeal from the United States District Court for the Central District of California, Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted November 1, 1989, Pasadena, California

Before: NORRIS, REINHARDT, and TROTT, Circuit Judges.

Walter Greene, Jr. appeals the district court's grant of summary judgment on his malicious prosecution and section 1981 claims.[1] We affirm.

I Malicious Prosecution

In order to establish a cause of action for malicious prosecution, a plaintiff

---

[1] Two other issues considered by the district court--a claim of interference with prospective business advantage and a request for further discovery--have not been pursued before this court and are thus not addressed here.

must establish that the underlying action (1) was terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 765 P.2d 498, 501, 254 Cal. Rptr. 336 (1989). Only the latter two requirements are disputed here.

In evaluating whether a plaintiff had probable cause to bring an action, the determinative question under California law is "whether any reasonable attorney would have thought the claim tenable." Id., 765 P.2d at 511. Once a trial court has determined that the underlying action was objectively reasonable, then "the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail." Id. at 506.

Appellant contends that a reasonable attorney in appellees' position would have found the abuse of process suit barred by 42 U.S.C. Section 2000e-3(a) (1982).[2] An examination of the case law of the time,[3] however, and the authority which appellant himself describes as "the leading treatise" on the subject reveals

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[2] Section 2000e-3(a) provides, in pertinent part, that

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

As appellant apparently does not contest the district court's finding that a reasonable attorney might have found the suit tenable under California law, we focus solely on the section 2000e-3(a) claim.

[3] Appellees filed their abuse of process suit on September 15, 1981.

support for appellees' position.

Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007 n.22 (5th Cir. 1969) and Avigliano v. Sumitomo Shoji Am., Inc., 473 F.Supp. 506, 516 (S.D.N.Y. 1979), aff'd on other grounds, 638 F.2d 552 (2nd Cir. 1981), vacated & remanded on other grounds, 457 U.S. 176 (1982) both indicate that under some circumstances an employer may not be barred from bringing an action in tort against an employee even though the employee has engaged in activity protected by Title VII. The treatise cited by appellant notes a divergence of opinion on this point and cites cases holding on both sides of the issue. B. Schlei & P. Grossman, Employment Discrimination Law

541 n.32 (2d ed. (1983)).[4] The treatise also notes that, in order to establish a violation of section 2000e-3(a), an employee must show a causal connection between the employee's participation in a protected activity and the employer's adverse action. Id. at 534. Standards of causation at the time ranged from a requirement that the employee show retaliation played any part in the action to proof that nonretaliatory motives would not have caused the adverse action absent the protected activity. Id. at 560-61. Appellees could well have believed that, since their suit was grounded on several significant bases other than appellant's protected

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[4] Although this edition of the treatise was compiled after the appellees' suit was filed, the bulk of the cases cited by the authors in their discussion were decided prior to that time.

activity,[5] appellant would be unable to show the required causal link.

While case law contrary to appellees' viewpoint did exist at the time they filed their abuse of process suit, most was factually distinguishable and none was binding on the district court.[6] Since

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[5] These include allegations that the Greenes used the judicial process to obtain the collateral advantage of delaying repayment of a $72,500 loan through threatening a "terribly involved lawsuit," asserting counterclaims in an earlier suit, Armco, Inc. v. Greene, No. 81-1231 ("Greene I"), and filing another suit, Greene v. Cohen, No. 81-4386 ("Greene II").

[6] See, e.g., EEOC v. Virginia Carolina Veneer Corp., 495 F.Supp. 775 (W.D. Va. 1980), dismissed, 652 F.2d 380 (4th Cir. 1981); Moran v. Simpson, 80 Misc. 2d 437, 362 N.Y.S.2d 666 (Sup. Ct. 1974); B. Schlei & P. Grossman, supra, at 541 n.31. Two of the Ninth Circuit cases cited by appellant, Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978) and Silver v. KCA, 586 F.2d 138 (9th Cir. 1978) dealt primarily with the "opposition clause" of Section 2000e-3(a), which offers a different scope of

appellees could have reasonably believed that their position was legally tenable, they have met the generous probable cause standard established by Sheldon Appel.

II Appellant's Section 1981 Claim

Appellant's section 1981 claim was dismissed on the merits and with prejudice by the district court when Greene I and Greene II[7] were consolidated and brought to trial in 1985. That decision was affirmed by the Ninth Circuit in an unpublished opinion. Armco v. Greene, No.

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protection than the "participation clause", on which appellant bases his claim; the third, Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) doesn't involve an employer's lawsuit, and doesn't address the key issues facing appellees at the time, viz., whether a tort action of this nature constitutes retaliation and whether actions based on a number of factors besides the protected activity are within the scope of section 2000e-3(a).

[7] See supra note 5.

85-6018 (9th Cir. Oct. 24, 1986).

Appellant claims that his claim should not be barred by res judicata because the prior judgments resulted from a fraud upon the court. The asserted fraud consisted of alleged perjury by appellees' attorney in a state bar proceeding and the judge's alleged "cover up" of that perjury. The "cover up" allegedly consisted of the judge's adoption of parts of findings of fact and conclusions of law drafted by appellees. The district court specifically found that there was no credible evidence of perjury. In rejection appellant's argument that the district court's findings should be given little deference, this court stated that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if

clearly erroneous." Armco v. Greene, No. 85-6018, at 3 (9th Cir. October 24, 1986 (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 572 (1985)). Since the purported perjury and subsequent judicial cover up constitute the sole basis for appellant's charge of fraud upon the court, his section 1981 claim is barred by res judicata.

III Sanctions

As the result of this appeal was not "obvious" and appellant's arguments were not "wholly without merit," see McConnell v. Critchlow, 661 F.2d 116, 118 (9th Cir. 1981), we conclude that appellees' request for sanctions must be denied.

Since appellant has failed to demonstrate that appellees initiated their abuse of process suit without probable cause, and since appellant's section 1981 claim is barred by res judicata, the

district court's judgment is

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
MEMORANDUM
United States Court of Appeals
for the Ninth Circuit
No. 87-6384

WALTER GREENE, JR.; KATHERINE L. GREENE,
Plaintiffs-Appellants,
v.
JAMES L. MEEDER; ARMCO INCORPORATED; BROBECK, PHLEGER & HARRISON; U.S. COURT OF APPEALS JUDGES OF THE NINTH CIRCUIT,
Defendants-Appellees.

On Appeal from the United States District Court, Central District of California, Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted December 7, 1988, Pasadena, California

Before: LEAVY, TROTT, Circuit Judges, and BREWSTER**, District Judge.

To recite fully the entire factual and legal setting in which this appeal arises would require an extremely lengthy decision, which in our judgment is not necessary. The parties no doubt are painfully aware of the lengthy multi-

faceted dispute between them and the numerous lawsuits it has spawned; there is no need to remind them of all the terrain which they have traversed -- although to us it is very noteworthy.

Suffice it to say for the purpose of this appeal that in a consolidated trial of numerous prior actions held before the Honorable Mariana R. Pfaelzer during July, 1985, the Greenes lost. This action was filed in the California Superior Court on April 21, 1987, against James L. Meeder, Armco Inc., and Brobeck, Phleger & Harrison. Others were identified in the caption of the Complaint as follows: "unnamed and unserved co-conspirators, Mariana R. Pfaelzer, other unnamed and unserved co-conspirators including judges of the U.S. Court of Appeals for the Ninth Circuit and Does 1-500, inclusive." The case was removed to the district

court.

The plaintiffs allege in their complaint that one of the issues in the previous litigation was whether James L. Meeder had committed perjury in his testimony before the State Bar Court of the State Bar of California. In paragraph eleven of the complaint, the plaintiffs allege that

> In order to cover up the aforementioned criminal act (perjury), and other unlawful acts of MEEDER, to wit, the submission of "information to the Equal Employment Opportunity Commission and violation of 42 U.S.C. Section 2000(e) et seq., (sic) PFAELZER, BROBECK, MEEDER and ARMCO, (hereinafter collectively "the conspirators"), conspired to deny the plaintiffs a trial by jury, and the right to have certain issues

determined by jury, and to deprive the plaintiffs of a fair trial before an impartial trier of fact."

ER 4.

In paragraph 7 of the complaint the plaintiffs further allege that

> This action arises under the United States Constitution, particularly under the provisions of the 7th and 14th Amendments to the United States Constitution, under the California Constitution, particularly Article I, Sections 7 and 16, and under the laws of the United States, particularly under Title 42, United States Code, Sections 1983 and 1985.

ER.3

Judge Pfaelzer, James L. Meeder, and the law firm of Brobeck, Phleger & Harrison, formed by Armco Inc., moved to dismiss. The court converted the motions

to ones for summary judgment. The defendants contended in support of their motion for summary judgment that the Greenes' case was nothing more than a poorly disguised and vexatious attempt to relitigate issues that had already been decided adversely to them. In response, the Greenes admitted that some of the issues may have indeed been decided, but they pointed out that Judge Pfaelzer's motives had not been scrutinized in connection with the new allegation, i.e., that the trial was nothing more than the unlawful product of a conspiracy.

The district court granted the defendants' motions for summary judgment and dismissed as to the other persons listed in the caption. In granting defendants' motion for summary judgment, the district court determined that (1) Judge Pfaelzer was entitled to absolute

immunity for acts performed in her judicial capacity; (2) the claims against Meeder, Brobeck, Phleger & Harrison, and Armco were barred by the doctrines of res judicata and collateral estoppel; and (3) the claims against the unnamed and unserved defendants were barred for failure to timely serve pursuant to Fed. R. Civ. P. 4(j). The Greenes timely appeal.

ANALYSIS

Initially, we note that while the complaint alleges violations and conspiracies to violate 42 U.S.C. Sections 1983 and 1985, it fails to state a claim under either because it does not allege that any of the defendants acted under color of state law or that their actions were motivated by any class-based animus. See Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986). However, it does seem to us that

this complaint states a claim under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), because one defendant, Judge Pfaelzer, was acting under color of federal law. Accordingly, we treat the complaint as made under Bivens. See Mullis v. U.S. Bankruptcy Court, 828 F.2d 1385, 1387 (9th Cir. 1987), cert. denied, 108 S.Ct. 2031 (1988).

A. Dismissal of Judge Pfaelzer

We doubt that Judge Pfaelzer is a party to this action because of the way plaintiff Walter Greene, Jr., a lawyer, has chosen to identify her in the caption; but we think she was prudent in making that assumption and responding. Judges sued under Bivens are absolutely immune from civil damage liability unless they act in absence of all jurisdiction or perform acts that are not judicial in

nature. Lonneker, 804 F.2d at 1097. In their complaint, the Greenes concede that Judge Pfaelzer "was acting in her capacity" as a federal district judge at all times pertinent to their action. Judicial immunity thus clearly bars their conspiracy claim against her.

B. Dismissal of Defendants Meeder, Brobeck, Phleger & Harrison, and Armco

A Bivens action does not lie against a private person, but a valid Bivens action may be stated against private persons who are willful participants in joint action with the government or its agents. See Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1338 n.17 (9th Cir. 1987). Under such circumstances, private parties may be liable even though the officials themselves are immune from civil liability. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). Therefore, the Greenes have

stated a claim against private actors Meeder, Brobeck, Phleger & Harrison, and Armco.

Although we agree with the district court that this lawsuit involves issues that have previously been finally decided, there is one issue that has never before been decided, and that is the alleged conspiracy to violate federal civil rights between these particular defendants and Judge Pfaelzer. Therefore, the district court, in relying only on the doctrines of res judicata and collateral estoppel, did not articulate a proper basis for granting the motion for summary judgment, since the conspiracy issue had not been previously litigated. It is on this ground that Francisco Enterprises, Inc., v. Kirby, 482 F.2d 481 (9th Cir. 1973), is distinguishable. Therefore, we are compelled to reverse

and remand this case for further proceedings.

C. Dismissal of Unnamed and Unserved Defendants

Because the Greenes did not properly serve the remaining unnamed and unserved defendants, including the Judges of the United States Court of Appeals for the Ninth Circuit and Does 1-500, within 120 days after filing the complaint, the district court properly dismissed the action as to them pursuant to Fed. R. Civ. P. 4(j). See Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985).

Costs are allowed to Judge Pfaelzer against the Greenes; others are to bear their own costs.

AFFIRMED in part, REVERSED and REMANDED in part.

** The Honorable Rudi M. Brewster, United

States District Judge for the Southern District of California, sitting by designation.

NOT FOR PUBLICATION
ORDER
United States Court of Appeals
for the Ninth Circuit
No. 87-6384

WALTER GREENE, JR.; KATHERINE L. GREENE,
Plaintiffs-Appellants,
v.
JAMES L. MEEDER; ARMCO INCORPORATED; BROBECK, PHLEGER & HARRISON; U.S. COURT OF APPEALS JUDGES OF THE NINTH CIRCUIT,
Defendants-Appellees.

Before: LEAVY, TROTT, Circuit Judges, and BREWSTER*, District Judge.

Appellant's motion to consolidate appeals No. 87-6384 and No. 88-6509 is DENIED.

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* The Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX C

MEMORANDUM OPINION
United States Court of Appeals
for the Ninth Circuit
No. 83-1669
(and consolidated appeals)
filed January 25, 1984

Appeals from the United States District Court for the Northern District of California Eugene F. Lynch, District Judge, Presiding and from the United States District Court for the Central District of California, Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted December 6, 1983

Before: SKOPIL, FERGUSON and CANBY, Circuit Judges.

(The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of Ninth Circuit for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to this Court as precedent.)

These appeals stem from several lawsuits filed by and against Walter Greene and his former employer, Bellefonte Re Insurance Company (Bellefonte), its parent corporation,

Armco, Inc., and their attorneys. We hold that the court in the Northern District case erred in not finding that an employment contract existed and in excluding certain relevant evidence, and therefore we reverse and remand. In addition, because the two Central District cases involving Greene's claims under 42 U.S.C. Section 1981 (CV 83-1669) and malicious prosecution and related claims (CV 83-6006) were resolved in Armco's favor based on res judicata, those decisions are also reversed. In the interest of the conservation of judicial resources, it is suggested that all claims on remand be consolidated in one of the courts.

The issues raised by the appeal in the Northern District are:

1. Was the district court's finding of no employment contract clearly erron-

eous and reversible error?

2. Did the district court commit prejudicial error by excluding a letter written by Bellefonte to the California Employment Department explaining the circumstances surrounding Greene's termination?

3. Did the district court err in failing to assess penalties under the California Labor Code?

4. Was the interest on the promissory note correctly computed?

DISCUSSION

1. The District Court's Finding that No Employment Contract Existed Was Clearly Erroneous.

California law treats employment contracts like any other agreement, and termination based on the employer's breach of a specific term of the contract is actionable. Drzewiecki v. H & R Block,

Inc., 24 Cal.App.3d 695, 101 Cal.Rptr. 169, 174 (1972). An implied employment contract, based on other factors, is one for continued employment absent just cause for dismissal. Pugh v. See's Candies, Inc., 116 Cal.App.3d 311, 171 Cal.Rptr. 917, 924 (1981).

The parties agree (1) that the company offered Greene a promotion and transfer to Los Angeles and (2) that he accepted that offer and prepared to move to Southern California in reliance upon that agreement. As a matter of law, a contract was formed; and the finding that no employment contract existed is therefore clearly erroneous. Starting from the premise that a contract existed, Greene should have been given the opportunity to litigate whether the decision to cancel the move was a breach of contract, was made in bad faith in light of the agree-

ment, or constituted negligent performance of a contractual obligation.

In its amendment to its opinion, the district court assumed that Greene was an employee-at-will and interpreted Cleary v. American Airlines, Inc., 111 Cal.App. 3d 443, 168 Cal.Rptr. 722 (1980), and Pugh to imply only a duty of good faith and fair dealing. These cases do more than that. They require a court to determine whether the employment relation is terminable at will or for a "reasonable" period, terminable only for cause. Pugh, 171 Cal.Rptr. at 924; Cleary, 168 Cal.Rptr. at 726. The district court thus used an incorrect legal standard in assessing whether an employment contract for an indefinite period existed.

2. The District Court Improperly Excluded Evidence Relating to the Termination of Greene's Employment on the Grounds of

Official Privilege.

A decision to exclude evidence over an objection will be grounds for reversal if a substantial right of a party is affected. Fed. R. Evid. 103(a). Under California law, an employer may be liable for wrongful discharge if the employee is discharged in retaliation for exercising a state statutory right as such action frustrates the public policy promoted by the state law. Cal. Cov't Code Section 12940(f); Montalvo v. Zamora, 7 Cal.App. 3d 69, 86 Cal.Rptr. 401 (1970); see also Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980).

The letter excluded by the district court was written by Griffith Parry, Bellefonte's in-house counsel, to the California Employment Development Department (the Department) to contest

Greene's entitlement to unemployment compensation. Greene sought to introduce this letter in support of his contention that he was wrongfully discharged in retaliation for going to the EEOC. The district court excluded the letter, finding it "confidential and privileged" under the California Unemployment Insurance Code.

When state law claims are litigated in federal court on the basis of diversity jurisdiction, state law applies to the question of privilege. Fed. R. Evid. 501. The California Evidence Code at section 1040 provides a privilege against disclosure of certain official information. That section covers information "acquired in confidence by a public employee" but excludes information which has been "officially disclosed, to the public prior to the time the claim of

privilege is made." Cal. Evid. Code Section 1040(a). The letter contesting Greene's eligibility for unemployment compensation was acquired in confidence by the Department, but a copy of it was in Greene's possession prior to trial. Thus the letter was disclosed, presumably by the Department prior to this litigation, and lost its privileged status under section 1040(a) of the California Evidence Code.

Armco and Bellefonte further argue that the letter is privileged under section 1084 of the Unemployment Insurance Code. That section provides in relevant part:

> Except as otherwise specifically provided in this code, the information obtained in the administration of this code shall be for the exclusive use and information of the director in discharge of his or her duties and shall not be open to the

> public, nor admissible in evidence in any action or special proceeding, other than one arising out of the provisions of this code.

(Emphasis added). Sections 1951-1959 of the Unemployment Insurance Code provide a hearing procedure wherein disputed claims can be settled. Assuming Greene obtained this letter when he challenged the denial of unemployment compensation, the section 1094 privilege cannot apply because presumably the letter was disclosed in order "to ascertain the substantial rights" of Greene and Bellefonte in disputing Greene's eligibility. See Cal. Unemp. Ins. Code Sections 1095, 1952. Indeed, as the California courts have noted, assuming the proper request, the Department must furnish a claimant all information in its possession regarding his elibilility(sic)

for benefits or "a serious question of due process would be presented." California Portland Cement Co. v. California Unemployment Insurance Appeals Board, 178 Cal.App.2d 263, 3 Cal.Rptr. 37, 45 (1960). See County of Nevada v. Kinicki, 106 Cal.App.3d 357, 165 Cal. Rptr. 57 (1980).

Greene was prejudiced by the improper exclusion of the letter as it evidences his employer's knowledge of his resort to the EEOC and its view that such action was "antagonistic." This raises the question whether the "deterioration of the employment relation" was sparked by retaliatory motives. Cf. Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1315 (9th Cir.), cert. denied, 103 S.Ct. 131 (1982).

3. We Need Not Determine Whether the District Court Erred in Not Awarding

Greene a Statutory Penalty.

As the case is reversed and remanded to the district court for a new trial which will be based upon the existence of an employment contract, it is not necessary for this court to determine whether the district court erred in not awarding Greene the statutory penalty set forth in section 201 of the California Labor Code.

4. The Interest Due on the Promissory Note Was Improperly Compounded.

Compound interest is "interest upon interest, where accrued interest is added to the principal sum, and the whole treated as a new principal, for the calculation of the interest for the next period." Black's Law Dictionary 950 (4th ed. 1951). The amount of interest computed by the district court on the promissory note was compounded annually.

It is unlawful in California to compound interest absent an express agreement to do so. Cal. Civ. Code Section 1916-2. The note provided for interest at 15% per annum and did not provide that it be compounded. We remand to the district court for a proper computation.

5. The Northern District Case is Not Res Judicata.

The issues raised in the two Central District cases are (1) whether dismissal was proper based on res judicata and (2) whether dismissal of Greene's suit for malicious prosecution was proper.

Both Greene's first Central District action, based on 42 U.S.C. Section 1981, and his second Central District case, based on section 1981 and interference with prospective business advantage, were dismissed based on the res judicata effect of the Northern District case. The

Northern District case, however, was improperly decided; and as the subsequent cases decided on res judicata were appealed, they cannot stand now that the underlying Northern District action has been reversed. Ornellas v. Oakley, 618 F. 2d 1351, 1356 (9th Cir. 1980); 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, Section 4433, at 311 (2d ed. 1983).

The second Central District case also involved Greene's claim for malicious prosecution, which was based on an earlier abuse of process suit filed by Armco in the Northern District. The Northern District judge had dismissed Armco's abuse of process claim (and Greene's counterclaim for abuse of process) on the pleadings. The Central District court entered a summary judgment against Greene because he failed to show

a favorable termination in the earlier abuse of process suit.

The Northern District court's dismissal of Armco's abuse of process claim against Greene reflects a favorable termination in his behalf. The court repeatedly noted that Armco had pled insufficient facts on which to base an abuse of process claim. When a "complaint is dismissed for failure to produce a case against the defendant, there is a favorable termination sufficient to form the basis of a tort action." Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 338 (1941).

CONCLUSION

The Northern District case is reversed for failure to find an employment contract. In addition, it was error to exclude the letter to the California Employment Development Department and to

compound the interest on the note. Because the decisions in the Central District cases were based on the res judicata effect of the Northern District cases, the decisions are reversed.

The cases are REVERSED AND REMANDED. The appellant is entitled to his costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-6509

WALTER GREENE, JR.,
Plaintiff-Appellant,

v.

ARMCO, INC., BROBECK PHLEGER &
HARRISON, JAMES L. MEEDER,
and WILLIAM C. ANDERSON,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT,
JUDGE, MARIANA R. PFAELZER

BRIEF OF APPELLANT WALTER GREENE, JR.

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Attorney for Appellant

> that attitude or state of mind which actuates the doing of an act for some improper or wrongful motive or purpose. It does not necessarily require that the defendant be angry or vindictive or bear any actual hostility or ill will toward the plaintiff.
>
> Malice, like any other fact, must be proved by direct or circumstantial evidence. California Jury Instructions, BAJI 7.34.

Hostility, ill will or vindictiveness is not necessary to establish malice. Albertson v. Raboff, 46 Cal.2d 375

(1956).

Moreover, if Pfaelzer has decided that malice is lacking because of res judicata, that is discussed in the next section.

There are two reasons why the prior decisions of Pfaelzer/Meeder are not res judicata.

The first reason is because Pfaelzer denied the Greenes their right to a jury. As previously stated, Pfaelzer stayed a jury trial in favor of a non-jury trial going first, and now used the facts established in the non-jury trial to deny the Greenes their right to jury. This is wrong.

Ordinarily one who asserts the important right to a jury trial in a timely fashion is entitled to a stay of an earlier non-jury resolution of the issues which might collaterally estop

exercise of this right to have them decided by jury. Beacon Theatre v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 44 (1972); Goldman, Sachs, & Co. v. Edelstein, 494 F.2d 76 (2nd Cir. 1974); Walton v. Eaton Corporation, 563 F.2d 66, 70-71 (3rd Cir. 1977).

Pfaelzer cannot deprive the Greenes of their rights to jury by substituting her conclusions of who was lying and who was not lying for that of a jury. The Greenes have been deprived of their constitutional right to have those questions decided by an impartial trier of fact.

In opposition to the motion for summary judgment, we argued in the trial Court:

"After the July 1985

trial, this Court indicated to Meeder that he could take the findings and conclusions and do with them whatever he felt was 'warranted'. Meeder found himself innocent of perjury, and found that Greene was lying and that Carbine was telling the truth. This Court, approximately two (2) months later, on October 24, 1985, signed those proposed findings of fact and conclusions of law, drafted by James L. Meeder.

Those findings of fact and conclusions of law, are an absolute fraud, and appear

> to be totally designed at covering up the perjury of James L. Meeder, and getting Mr. Meeder off the hook from exposure in this instant lawsuit.
>
> The idea appears to have been to have held a lawsuit where the outcome was already predetermined, and to dispose of other pending lawsuits on issue preclusions or res judicata grounds."

This, we strongly believe as we have repeatedly stated this position to Pfaelzer and in the Ninth Circuit.

The general rule is, of course, that a judgment, even though it contains elements of intrinsic fraud, will still

be res judicata. United States v. Throckmorton (1978) 98 U.S. 61, 25 L.Ed. 93. The rationale appears to be that stability of judgment and Court proceedings is more important than a litigant having a fair and correct determination of the issues of a lawsuit. There was not a fair and correct determination of the issues of the lawsuits between Greene and the Meeder parties.

The rule is different, however, when the fraud is not a fraud only to the other party, but is also a fraud upon the Court. The rule is explained in the leading case of Hazel-Atlas Co. v. Hartford Co., 32 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250, where the U.S. Supreme Court stated:

> "Furthermore, tampering with the administration of justice in the manner

indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be the preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute

> and helpless victims of deception of fraud."

See also Toscano v. C.I.R., 441 F.2d 930 (9th Cir. 1971).

As stated by the Court in Toscano v. C.I.R., supra, if Greene's allegations are true, he has never had his "day in Court." Id. at 936.

Perpetrating a fraud upon the Court would be grounds for ignoring a prior judgment or order of the Court and striking it, or setting it aside, or in this case, simply ignoring it so that a fair trial may be had. See 7 Moore Federal Practice, Section 60.63.

We stated in the trial Court:

> "We believe that a simple solution is for this matter to proceed to trial, with James L. Meeder's statement, and

the relevant facts of Walter Greene's "contempt" being placed before a jury. If a jury decides that James L. Meeder did not commit perjury on September 27, 1983, the inquiry ends. Conversely, if a jury decides that James L. Meeder gave false and perjured testimony on September 27, 1983, we believe it will be proof positive that the findings and conclusions upon which the defendants rely are pure sham and should have been properly disregarded. We would suggest that the Court simply let the parties try their cases

> when this matter proceeds to trial, without reference to those findings and conclusions."

There is no question that James L. Meeder, on September 27, 1983, committed perjury. There is no question that Judge Mariana R. Pfaelzer has attempted, for all these many years, to cover up that perjury. That's fraud, and that's a fraud upon the Court when the purpose of the prior rulings has been to obstruct justice, not to do justice.

D. <u>There Has Been A Change In California Law Regarding Malicious Prosecution Of Which This Court Should Be Aware</u>.

Much of Pfaelzer's opinion is based upon the case of <u>Tool Research v.</u>

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ORDER
CASE NO. 87-2621 (CBM)

WALTER GREENE, JR. and
KATHERINE L. GREENE,
Plaintiffs,
v.
JAMES L. MEEDER, et al.,
Defendants.

This matter is before the Court, the Honorable Judge Consuelo B. Marshall presiding, on the Motion of Plaintiffs Walter Greene, Jr. and Katherine L. Greene for Summary Adjudication of Issues, and the Motion of Defendants James L. Meeder, Armco, Inc. and Brobeck, Phleger & Harrison for Summary Judgment.

Having reviewed the moving papers, oppositions and replies, as well as all other relevant documents before the court, and having heard oral argument by defendants, the Court hereby finds as follows:

FACTUAL AND PROCEDURAL HISTORY

On April 21, 1987, plaintiffs Walter Greene, Jr. and Katherine Greene commenced the herein action in the Superior Court of the State of California against the law firm of Brobeck, Phleger & Harrison, defendant James Meeder, an attorney, Judge Mariana Pfaelzer and other unnamed and unserved co-conspirators, including judges of the Court of Appeal for the Ninth Circuit. The complaint alleges, inter alia, violations of Civil Rights guaranteed by the seventh and fourteenth amendments, and violations of 42 U.S.C. sections 1983 and 1985.

The gravamen of this action stems from plaintiffs' dissatisfaction with adverse rulings in several prior actions, including Armco, Inc. v. Walter and Kathrene (sic) Greene, CV 81-5129 ("Greene I"),

and Greene v. Cohen, et al., CV 81-4386 ("Greene II") (which were eventually consolidated), and plaintiffs' claims that during these proceedings, defendants engaged in a conspiracy to deprive them of their right to due process and equal protection, and a trial by jury. This action was removed to federal court on May 18, 1987.

Plaintiffs allege, specifically, that defendant Meeder had committed perjury in his testimony before the State Bar Court in September, 1983, and that the other defendants, including Judge Pfaelzer (who, presided in the consolidation of Greene I and II in 1985) and other judges of the Ninth Circuit, conspired to deny plaintiffs their rights in order to cover up that perjury.

Judge Pfaelzer had allowed Meeder's state bar testimony to be admitted into

evidence at trial. At the end of trial, Judge Pfaelzer specifically found that Meeder did not give false or perjured testimony before the State Bar court, that Meeder was a credible witness at trial, that Walter Greene was not a credible witness, and that statements such as Meeder's made by witnesses in state bar proceedings are absolutely privileged under California law.[1] Judge Pfaelzer ordered that the Greene's claims in Greene I and II be dismissed on the merits and with prejudice, and, finding that the Greenes' claims were an abuse of process, imposed sanctions against plaintiffs under Rule 11.

In October, 1986, the judgment in

---

[1] Judge Pfaelzer, over plaintiff's objections, had adopted parts of findings of fact and conclusions of law drafted by defendants.

Greene I and II was affirmed, except for the calculation of interest, by the Ninth Circuit.

On October 31, 1987, this court granted summary judgment in favor of defendants in the instant action on the grounds that Judge Pfaelzer was immune from suit in her capacity as a judicial officer, that the claims against the attorney defendants were barred by res judicata and collateral estoppel, and that the claims against the unnamed and unserved defendants were barred for failure to timely serve pursuant to Fed.R.Civ.Proc. 4(j). Plaintiffs appealed this determination.

On August 31, 1989, the Ninth Circuit, in an unpublished decision, affirmed the immunity of Judge Pfaelzer and the failure to timely serve the unnamed defendants, but reversed and remanded as

to this court's finding that plaintiff's claims against the other defendants were barred by res judicata and collateral estoppel. The Appellate Court found that while certain issues had previously been litigated and determined in Greene I and II, the conspiracy issue had not.[2]

Meanwhile, in 1983, the Greenes brought an action against Mr. Meeder, Armco, Brobeck and others for violation of 42 U.S.C. sec. 1981 and pendent claims for interference with prospective business advantage and malicious prosecution, Greene v. Armco, Inc. ("Greene III").

In September, 1988, Judge Pfaelzer

---

[2] The Ninth Circuit had noted that while the Greene's complaint failed to state claims for violations of 42 U.S.C. sections 1983 and 1985, it could be read to state a Bivens claim because it appeared to allege a conspiracy between defendants and a federal agent, Judge Pfaelzer.

entered summary judgment in favor of defendants in Greene III based, in part, upon the preclusive effect of the previous adjudications in Greene I and II.

On January 12, 1990, the Ninth Circuit affirmed the judgment entered in Greene III.

Plaintiffs move for summary adjudication as to the issue of whether defendant James L. Meeder committed perjury when he testified before the State Bar Court that Walter Greene, Jr. had been held in contempt of court in Meeder's presence. The perjury allegation underlies plaintiffs' conspiracy allegation.

Defendants move for summary judgment on the ground that plaintiffs are collaterally estopped from relitigating the perjury issue and as such, are unable to state a claim for conspiracy. Defendants

also contend, irrespective of preclusion, that Meeder's testimony was accurate and not perjured.

DISCUSSION

To state a Bivens claim against a private person, it is essential that a plaintiff plead and prove that the private person conspired with a federal agent. Schowengerdt v. General Dynamics Corporation, 823 F.2d 1328, 1338 n.17 (9th Cir. 1987).

In their motion for summary adjudication, plaintiffs concede that their conspiracy allegation is based entirely upon the claim that defendants conspired with Judge Pfaelzer to cover up the perjured testimony given by Mr. Meeder before the State Bar Court. Plaintiffs' claim that Meeder committed perjury is based upon their denial that Walter Greene Jr. has ever been cited for

contempt. Plaintiffs concede, further, that if there was no perjury, then there was no cover-up and their conspiracy claim must fail. If plaintiffs are collaterally estopped from relitigating the perjury issue, their conspiracy claim, likewise, must fail.

a. Collateral Estoppel

The doctrine of Collateral Estoppel bars parties, or those in privity with them, from relitigating issues actually litigated and determined in, and necessary to the disposition of, a former proceeding. Allen v. McCurry, 449 U.S. 90, 95 (1980); Aguilar v. Los Angeles County, 751 F.2d 1089, 1092 (9th Cir.), cert. denied, 471 U.S. 1125 (1985).

As discussed, the Ninth Circuit has affirmed the judgment and findings entered in Greene I and II, and has specifically ruled in a January 12, 1990

memorandum opinion that plaintiffs are precluded from relitigating the issue of whether Meeder's state bar testimony was perjured.

Plaintiffs' contention that the doctrine of res judicata is inapplicable herein because this is a case of fraud on the court, is without merit, especially in light of the above Ninth Circuit rulings. Plaintiffs have provided no evidence of such fraud, relying instead merely upon their unsupported conspiracy allegations.

Plaintiffs, accordingly, are precluded from relitigating (or attempting to summarily adjudicate, as a matter of law) the issue of whether Mr. Meeder's state bar testimony was perjured. Since plaintiffs, by their own admission, must prove this in order to state a conspiracy claim, summary judgment in favor of

defendants on this issue is appropriate.

b. Meeder's Testimony

Plaintiffs contend that Meeder's testimony that Walter Greene has been cited for contempt was perjured because they claim he has never been cited for contempt. Meeder's testimony that Greene had been cited for contempt, as evidenced by Meeder's responses to an interrogatory propounded by plaintiffs, was based upon three orders entered in Greene I.

These orders, however, are not contempt citations, nor do they establish that plaintiff was ever actually cited for contempt. However, although Meeder's testimony, in light of these orders, was not entirely accurate, neither does Meeder's testimony rise to the level of perjury.

Perjury requires a specific intent to make a false statement under oath,

wherein the statement is known by the accused to be false at the time it was made, and is wilfully made. People v. Story, 168 Cal.App.3d 849, 216 Cal.Rptr. 158 (1985). Plaintiff has provided no evidence of Meeder's intent to make a false statement, or of his knowledge that his statement as to Greene's contempt citations was in fact false.

c. Additional Contentions

Defendants contend, as additional grounds in support of summary judgment, that plaintiffs' Bivens claim is barred by both the statute of limitations, and the Special Factors Doctrine.

In light of the court's findings on preclusion however which are dispositive of the herein motions, the court need not address defendants' additional contentions.

Likewise, plaintiffs' claim that

defendants' motion should be denied until defendants have complied with their discovery obligations because plaintiffs do not yet have the evidence they need to oppose defendants' motion, does not preclude summary judgment in favor of defendants on the basis of collateral estoppel: The evidence sought by plaintiffs' requests would not alter the fact that the herein issues have been litigated and determined in favor of defendants. Moroever(sic), as evidenced by their own motion, plaintiffs are fully apprised of the basis for Meeder's testimony that Greene had been cited for contempt, the subject of the unfulfilled discovery requests.

Accordingly, defendants' Motion for Summary Judgment is GRANTED on the grounds that plaintiffs are collaterally estopped from relitigating the issue of

perjury, upon which their conspiracy claim is predicated. For the same reason, plaintiffs' Motion for Summary Adjudication is **DENIED**.

IT IS SO ORDERED.

This order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 56.

Dated: 4/5/90

(Signed)
Consuelo B. Marshall, Judge
United States District Court

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

(2)

No. 89-1802

FILED
JUN 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

WALTER GREENE, JR.,

Petitioner,

vs.

ARMCO, INC., BROBECK, PHLEGER & HARRISON, JAMES L. MEEDER and WILLIAM C. ANDERSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 89-1802

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

WALTER GREENE, JR.,

Petitioners,

vs.

ARMCO, INC., BROBECK, PHLETER & HARRISON, JAMES L. MEEDER, and WILLIAM C. ANDERSON,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

The complicated background of the eleven lawsuits filed by Mr. Greene over the years arising from essentially the same subject matter is recounted in the District Court's opinion granting summary

judgment in favor of respondents, which is published as Greene v. Armco, Inc., 696 F. Supp. 1328 (C.D. Cal. 1988). Mr. Greene's petition is directed against the Ninth Circuit's unpublished affirmance of the summary judgment entered by the District Court. The "earlier filed" non-jury actions referred to in Mr. Greene's petition are designated as "Greene I" and "Greene II" in the District Court's published opinion. What the petition refers to as the "later filed jury action" is designated as "Greene III" and was the object of the District Court's opinion and entry of summary judgment.

The petitioner seeks to defeat issue preclusion by arguing that his waiver of the right to a jury trial in Greene I and Greene II should eliminate the preclusive effect of the judgment entered in those actions with respect to the petitioner's later filed action, Greene III. This

contention is not worthy of certiorari for three reasons. First, This Court already has held to the contrary in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Second, it is well settled that if the original pleadings in an action effectively waive trial by jury under Federal Rule of Civil Procedure 38, the waiver of right to trial by jury of all matters in those pleadings cannot be later revived by amending the original pleadings or by filing a new action. Third, Mr. Greene is making his argument belatedly in the wrong case. Any petition presenting the question of whether Greene I and Greene II should have been stayed in favor of a jury trial of Greene III was required to have been filed in 1986 after the Ninth Circuit affirmed the judgments in Greene I and II. The right to jury trial is not, and has never been, an issue in Greene III, which was decided by summary

judgment.

Mr. Greene's contentions regarding "fraud upon the court" also are undeserving of certiorari. First, the sole basis for Mr. Greene's charge of "fraud" is his disagreement with the District Court's finding in Greene I and II that respondent Meeder had not committed perjury in the California State Bar's investigation of Mr. Greene's moral fitness, which finding was affirmed by the Ninth Circuit in 1986. As the Ninth Circuit pointed out in its recent affirmance of the judgment in Greene III, Mr. Greene's raising of the identical issue of perjury and calling it "fraud upon the court," without any additional showing, does not act to disturb the preclusive effect of the prior adjudication. Mr. Greene's petition raises no properly reviewable issue on this subject.

I.

THE QUESTIONS PRESENTED ARE NOT APPROPRIATE FOR CERTIORARI

The Not for Publication Memorandum of the United states Court of Appeal for the Ninth Circuit styled Walter Greene, Jr. v. Armco, Inc., etc., et al., No. 88-6509 from which the petitioner seeks relief is neither a decision of a federal court of appeal (i) that conflicts with decisions of other sister courts "on the same matter," (see e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 700 (1982)); (ii) nor one that decides federal questions "in a way in conflict" with a state court (see e.g., Andersen v. Maryland, 427 U.S. 463, 470 n.5 (1976); Lakeside v. Oregon, 435 U.S. 333, 336 n.3 (1978)); nor one that has "so far sanctioned such a departure by a lower court, as to

call for an exercise of this Court's power of supervision" (see e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 1981)) under Rule 10.1(a) of the Rules of the Supreme Court.

Nor is the petition based on a decision by a federal court of appeal on an important question of federal law (i) that has not been, but should be, decided by the Supreme Court, or (ii) that has been decided "in a way in conflict wtih applicable decisions of this Court," as required under Rule 10(c).

A. The Supreme Court Has Twice Decided the Scope of Issue Preclusion for Non-Jury Judgments

Mr. Greene contends that the "question of what should be the proper order when there are multiple actions with the later filed action containing the right to jury

[sic] has not been decided by this Court." (Petition at 14.) However, this Court already twice has determined that the offensive use of collateral estoppel, which forecloses litigation before a jury of factual issues already decided in a non-jury action, does not violate the Seventh Amendment. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Katchen v. Landy, 382 U.S. 323 (1966).

The question presented in Parklane Hosiery was "whether a party who has had issues of fact adjudicated adversely to it in an equitable [non-jury] action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party." Parklane Hosiery, 439 U.S. at 324. In resolving the issue, the Supreme Court acknowledged that it already had held in Katchen that "an equitable [non-jury]

determination can have collateral estoppel effect in a subsequent legal action and this estoppel does not violate the Seventh Amendment." Parklane Hosiery, 439 U.S. at 335.

In Parklane Hosiery, the party against whom collateral estoppel was invoked had been a party in another action, an SEC suit brought in the district court in which a jury was not required. Judgment already had been issued in that proceeding, and had been affirmed by the court of appeals. The Supreme Court held, inter alia, that this first judgment would have a preclusive effect in the later action, even though the second action was triable to a jury.

In short, Parklane Hosiery established that "preclusion may not be defeated simply by showing that there was no right to trial by jury in the first action and that there is a constitutional right to trial by jury

in the second action, no matter what anguish that may cause to those who believe in juries." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4465 at 600 (1981); see also Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 355-57 (7th Cir. 1987); Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Benjamin v. Traffic Exec. Ass'n. - Eastern Railroads, 688 F.Supp. 903, 909-910 (S.D.N.Y. 1988). Indeed, in Parklane Hosiery, the Court found this principle implicit in the very cases cited by Mr. Greene, Beacon Theatre, Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). (Petition at 2.) As the Court noted in Parklane, "[b]oth the premise of Beacon Theatres, and the fact that it enunciated no more than a general prudential rule were confirmed by this Court's decision in Katchen v. Landy, 382 U.S. 323."

Then quoting from that decision the Court continued:

> Both Beacon Theatres and Dairy Queen recognized there might be situations in which the Court would proceed to resolve the equitable [non-jury] claim first even though the results might be dispositive of the issues involved in the legal claim.

Parklane Hosiery, 439 U.S. at 335-36.

In the case at bar, the petitioner seeks to defeat preclusion by arguing that his waiver of the right to jury in his first legal action should eliminate the preclusive effect of that action's judgment in the petitioner's later filed legal action. Specifically, the petitioner requests that the Court determine, "whether the principles of Beacon Theatre and Dairy Queen apply when the jury case is filed subsequent to the non-jury case." (Petition at 3.) As the tougher question, i.e., whether an equity judgment can preclude a subsequent legal action,

already has been determined, certainly this petition is not appropriate for certiorari.

B. Waiver of Jury Trial Cannot Be Revived

It is well settled that if the original pleadings in a legal action effectively waive trial by jury under Federal Rule of Civil Procedure 38, the right to trial by jury of all matters waived in those pleadings cannot be later revived by amending the original pleadings or by filing a new legal action. Walton v. Eaton Corp., 563 F.2d 66, 71 (3d Cir. 1977); Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 581 (7th Cir. 1975); Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1049 (9th Cir. 1974); Lanza v. Drexel and Co., 479 F.2d 1277, 1310 (2d Cir. 1973); Williams v. Farmers and Merchants Ins. Co., 457 F.2d 37, 38 (8th Cir. 1972); Connecticut

General Life Ins. Co. v. Breslin, 332 F.2d 928, 931 (5th Cir. 1964). Indeed, Mr. Greene concedes as much. (Petition at 18.)

Nonetheless, Mr. Greene seeks to vitiate this rule of law in favor of one in which a plaintiff would be entitled to stay a lawsuit in which he has waived jury trial simply by filing another lawsuit in which he does not waive jury trial. (Petition at 19.) Such a rule, if adopted, would nullify the provisions of Federal Rule of Civil Procedure 38, which requires a timely demand for jury trial, and would lead to a multiplicity of lawsuits and stays. In short, the proffered issue is not appropriate for certiorari.

C. The "Fraud upon the Court" Issue Does Not Rise above the Level of Simple Issue Preclusion

Mr. Greene's contentions regarding "fraud upon the court" do not present any issue appropriate for certiorari. It is, of course, already settled that an actual showing of fraud on the court may create an exception to the preclusion doctrines. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). However, in the instant case, Mr. Greene's charge of "fraud" is based solely upon matters that were raised in the appeal from the judgment entered in Greene I and Greene II and that were adjudicated against him by the Ninth Circuit in 1986.

Indeed, as the District Court noted in its opinion in Greene III:

> Greene has presented no evidence to support his contention that

> the judgment in Greene I and II are not entitled to preclusive effect because they were the product of fraud. The indications of fraud that he points to, Meeder's alleged perjury before the Bar and Meeder's alleged participation in the findings of this Court, have been addressed by this Court and by the Ninth Circuit.

Greene v. Armco, Inc., 696 F.Supp. at 1340.

In affirming the judgment in Greene III, the Ninth Circuit also recognized that the matters proffered by Mr. Greene as constituting "fraud" were matters that already had been addressed in the appeal from Greene I and Greene II and had been adjudicated against him. After citing to its unpublished affirmance entered in 1986, the Ninth Circuit concluded: "Since the purported perjury and subsequent judicial cover up constitute the sole basis for appellant's charge of fraud upon the court, his section 1981 claim is barred by res

judicata." (Exhibit "A" to Petition at 9, emphasis added.) In other words, Mr. Greene made no cognizable showing of fraud beyond matters that already had been determined against him. This facet of the Ninth Circuit's affirmance presents no appropriate issue for review by this Court.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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